

STATE OF MICHIGAN
COURT OF APPEALS

DEUTSCHE BANK NATIONAL TRUST
COMPANY, as Trustee for the MORGAN
STANLEY ABS CAPITAL 1 INC TRUST,

Plaintiff/Counter-Defendant-
Appellee,

v

SHERMAN M. HUBBARD,

Defendant/Counter-Plaintiff-
Appellant,

and

SALLY A. HUBBARD,

Defendant-Appellant,

and

LOST LAKE WOODS ASSOCIATION,

Defendant.

Before: WILDER, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Sherman and Sally Hubbard appeal as of right the trial court's order awarding Deutsche Bank National Trust Company ("Deutsche Bank") an equitable mortgage to a parcel of real property and ruling that Deutsche Bank's equitable mortgage is superior to the Hubbard's interest. We affirm.

UNPUBLISHED
December 13, 2011

No. 300388
Alcona Circuit Court
LC No. 09-001401-CH

In 2004, Sherman Hubbard obtained a \$164,000 mortgage from Nationwide Lending Corporation¹ that was secured by lots 19 and 20 located at 4297 North Poplar Road in Lincoln, Michigan. While lot 18 was also located at that address, it was not included in the mortgage agreement as security for the mortgage.

Nationwide assigned its interest in the mortgage to Deutsche Bank and thereafter Sherman Hubbard filed for bankruptcy. Deutsche Bank realized that the mortgage agreement did not include lot 18 as security for the loan as it believed was intended. To correct the error, Deutsche Bank contacted Sherman Hubbard and asked that he agree that lot 18 was also security for the mortgage.

Sally Hubbard, Sherman Hubbard's mother, then recorded two quitclaim deeds. One deed dated October 2, 2001 conveyed lot 18 from Sherman Hubbard to Sally Hubbard. The second deed, also dated October 2, 2001, conveyed lots 19 and 20 from Sherman Hubbard to Sherman and Sally Hubbard as joint tenants.

Deutsche Bank filed a complaint against the Hubbards seeking either reformation of the mortgage to include lot 18 or imposition of an equitable mortgage on lot 18. Sherman Hubbard asserted that only lots 19 and 20 were to serve as security for the mortgage as he transferred ownership of lot 18 to his mother in 2001, so he had no interest in lot 18. After a bench trial, the trial court granted Deutsche Bank's request for an equitable mortgage over lot 18 and ruled that it had priority over the Hubbards' interest.²

On appeal, the Hubbards only contend that the trial court did not have the authority to grant an equitable mortgage on lot 18. We disagree.

This Court reviews the trial court's findings of fact after a bench trial for clear error, while its legal conclusions are reviewed de novo.³ Although equitable actions are also reviewed de novo on appeal, the ultimate decision "rests in the sound discretion of the court," based on the particular facts and circumstances of the case.⁴

Equitable remedies, such as an equitable mortgage, arise from a court's ability to fashion a remedy in order to avoid injustice.⁵ In the absence of an express, written agreement, an equitable mortgage may only be granted when the parties clearly manifested their intent to use a

¹ Deutsche Bank's predecessor-in-interest.

² Although the trial court denied Deutsche Bank's request to reform the mortgage, Deutsche Bank does not contest that decision on appeal.

³ *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007).

⁴ *Tkachik v Mandeville*, 487 Mich 38, 44-45; 790 NW2d 260 (2010).

⁵ *Id.* at 45-46, citing *Spoon-Shacket Co, Inc v Oakland Co*, 356 Mich 151, 163; 97 NW2d 25 (1959).

piece of property as security for a loan.⁶ Because a mortgage establishes an interest in land that is governed by the statute of frauds, a trial court cannot invoke equity to sidestep the writing requirement unless there is proof of fraud, accident, or mistake.⁷

The record contains evidence that a mistake was made and Sherman Hubbard intended for lot 18 to be used as security for the mortgage.⁸ Hubbard consistently treated lots 18, 19 and 20 as the same parcel of land, as he built a home across all three lots and they had the same mailing address. Also the prior mortgages Hubbard obtained, which were discharged by the proceeds from the mortgage in this case, were secured by all three lots. While the mortgage agreement in this case specifically states that it was secured by lots 19 and 20, the loan application for the mortgage indicates that the market value for the property securing the loan was \$205,500, which comprised the combined appraisal value of lots 18, 19 and 20.

While Hubbard contends that he transferred ownership of lot 18 to Sally Hubbard in 2001, the record contains evidence that the execution date on the quit claim deed was not authentic. The notary public whose name is typewritten on the deed as a witness admitted at trial that he did not meet Hubbard until years after the alleged execution of the document. The trial court made determinations of the weight of the evidence and credibility of the witnesses regarding the alleged transfer of ownership, and this Court will not review the trial court's determinations in that regard.⁹ Because the evidence shows that but for a mistake, lot 18 was to be included as security for the mortgage, the trial court did not abuse its discretion in granting equitable relief to Deutsche Bank.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot
/s/ Deborah A. Servitto

⁶ *In re Estate of Moukalled*, 269 Mich App 708, 719; 714 NW2d 400 (2006).

⁷ *Burkhardt v Bailey*, 260 Mich App 636, 659; 680 NW2d 453 (2004).

⁸ *Id.*

⁹ *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 113; 793 NW2d 533 (2010).